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IN THE

Supreme Court of the United States

October Term, 1944

No. 1017

CALIFORNIA ALKALI EXPORT ASSOCIATION,
WEST END CHEMICAL CO., (INC.),
PACIFIC ALKALI CO., (LTD.),

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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WEST END CHEMICAL CO., (INC.),
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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Now come your petitioners, California Alkali Export Association, West End Chemical Co., (Inc.), and Pacific Alkali Co., (Ltd.), by their attorney, and respectfully pray that they be granted leave to file their petition, submitted herewith, for a writ of certiorari to the District Court of the United States for the Southern District of New York.

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IN THE

Supreme Court of the United States

October Term, 1944

No.

CALIFORNIA ALKALI EXPORT ASSOCIATION,
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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, California Alkali Export Association, West End Chemical Co. (Inc.), and Pacific Alkali Co. (Ltd.), respectfully pray for a writ of certiorari to the District Court of the United States for the Southern District of New York to review an order entered January 12, 1945, by said Court, denying a motion to dismiss the respondent's complaint herein for lack of jurisdiction over the subject matter.[1]

[1] Petitioners herein were not original parties to the motion to dismiss, but by stipulation and order of the District Court were treated as having joined in said motion.

Statement

This is a case of first impression, presenting an issue of jurisdiction under the Webb-Pomerene and Sherman Acts that has not heretofore been passed upon by the courts.

Petitioners are an export trade association, formed under the Webb-Pomerene Export Trade Act,[2] and its members. They are defendants, together with another such association and its members, in a suit in equity in the District Court brought by the Attorney General for an injunction against alleged violations of Section 1 of the Sherman Anti-Trust Act,[3] involving acts done by, or in alleged combination or conspiracy with, such associations. A motion was made to dismiss the complaint on the ground that it contained no allegation that the matter had been referred to the Attorney General by the Federal Trade Commission under Section 5 of the Webb-Pomerene Act and that consequently the District Court was without jurisdiction. This motion was denied by the District Court.

The ruling of the court below presents a question of general importance as to whether a United States District Court exceeds its jurisdiction in entertaining a suit in equity by the Attorney General under the Sherman Act against export trade associations (and their members) formed and operating under the Webb-Pomerene Act, prior to a reference of the matter by the Federal Trade Commission to the Attorney General under Section 5 of the Webb-Pomerene Act for such action thereon as he may deem proper.

The allegations of the complaint are in substance and effect that all of the activities complained of were part of,

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[2] Act of April 10, 1918, c. 50, 40 Stat. 516, 15 U. S. C. A. §§ 61-65.

[3] Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. §§ 1-7, 15.

and intertwined with, the activities of an export trade association. No act separate and apart from the activities of an export trade association, or outside of the scope of the agreements, combinations and conspiracy to which an association is alleged to have been a party, is pointed to as a violation of law. The entire purport of the pleading is that the alleged acts and conspiracies grew out of and were done or entered into pursuant to the leadership, or with the active participation, of an export trade association.

The all-pervasive participation of an export trade association in each of the matters set forth in the complaint would render it impossible to distinguish and separate any of them from the matters over which the Federal Trade Commission is given power under the Webb-Pomerene Act.

The question is one exclusively of jurisdiction. Petitioners contend that under Sections 2 and 5 of the Webb-Pomerene Act, exclusive primary jurisdiction is conferred upon the Federal Trade Commission with respect to acts of export trade associations registered with the Commission under that Act. They do not contend that the Webb-Pomerene Act repealed the Sherman Act, but only that the duty of the Attorney General to enforce the latter Act and the jurisdiction of the District Court to entertain a proceeding thereunder have been deferred, as to the actions of an export trade association, until the primary jurisdiction of the Commission has been exercised.

Section 2 of the Webb-Pomerene Act provides, for associations registered thereunder with the Commission and for agreements made and acts done in the course of export trade by such associations, a comprehensive exemption from the Sherman Act, subject to four exceptions:

(1) such association, agreement or act is not in restraint of trade within the United States;

(ii) such association, agreement or act is not in restraint of the export trade of any domestic competitor of such association;

(iii) such association does not enter into any agreement, understanding or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association; and

(iv) such association does not enter into any agreement, understanding or conspiracy or do any act which substantially lessens competition within the United States or otherwise restrains trade therein.

Section 5 of the Act lodges in the Federal Trade Commission special supervisory jurisdiction over such associations engaged in foreign commerce. Specified reports must be filed with the Commission, together with such other information relating to the association's organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals, as the Commission may require. Penalties are provided for failure to comply.

The second paragraph of Section 5 empowers and directs the Commission to investigate and determine whether, in any instance, the limits of the exemption provided by Section 2, as defined by the four exceptions, have been exceeded. The authority so granted is in terms identical with the provisions of Section 2 and consequently covers the entire scope of that section.

The same paragraph provides that if the Commission shall conclude that the law has been violated, it may make recommendations to the association and if such recommendations are not complied with, the Commission shall

refer the matter to the Attorney General for such action as he may deem proper.

It is the position of petitioners that, until such a reference has been made by the Commission, the District Court is without jurisdiction to entertain an action by the Attorney General.

Jurisdiction to Review

The jurisdiction of this Court is invoked under Section 262 of the Judicial Code [36 Stat. 1162, 28 U. S. C. A. § 377], by reason of this Court's exclusive appellate jurisdiction in equity suits by the Attorney General under the Sherman Anti-Trust Act and in aid of such exclusive appellate jurisdiction [Acts of Feb. 11, 1903 (32 Stat. 823) and Mar. 3, 1911 (36 Stat. 1167), 15 U. S. C. A. § 29].

The grant of the writ is respectfully sought to correct a claimed excess of jurisdiction by the court below and in furtherance of the determination of a question of great public importance.

See *In re Chetwood*, 165 U. S. 443, 462 (1897); *McClellan* v. *Carland*, 217 U. S. 268 (1910); *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282 (1918); *Spiller* v. *Atchison T. & S. F. Ry. Co.*, 253 U. S. 117 (1920); *In re 620 Church Street Corp.*, 299 U. S. 24, 26 (1936); *Holiday* v. *Johnston*, 313 U. S. 342, n. 2 (1941).

Opinion Below

The opinion of the District Court, (R. [illegible]) has not been reported.

Questions Presented

1. Whether a District Court has jurisdiction to entertain an equity proceeding under the Sherman Anti-Trust Act relating solely to acts done by, or under the leadership

of an export trade association registered with the Federal Trade Commission under the Webb-Pomerene Export Trade Act, prior to a reference, pursuant to Section 5 of that Act, by the Federal Trade Commission of its findings and recommendations to the Attorney General for action thereon.

2. Whether the Federal Trade Commission has been entrusted by Section 5 of the Webb-Pomerene Export Trade Act with exclusive primary jurisdiction to make the findings, within a single continuous chain of events inaugurated and directed by an export trade association registered with the Commission, as to which of the activities constituting such chain of events come within the exemptions granted by the Act and which fall within its exceptions.

Reasons Relied on for the Allowance of the Writ

1. A Prompt Determination of the Issue Presented Is Required in the Public Interest.

Until this Court has determined the issue here presented, the resulting uncertainty as to its ultimate conclusion will have effects upon industry and foreign trade of great importance to the public.

The protracted and time-consuming character of anti-trust litigation, like that of railroad receiverships prior to amendment of the Bankruptcy Laws,[4] is a matter of common knowledge. Were a final determination of this issue deferred pending a conclusion of the proceedings in the District Court, it may reasonably be assumed that the lapse of time would be comparable to that in other anti-trust cases. The consequences are both evident and significant.

[4] *Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, Rock Island & Pacific R. Co.*, 294 U. S. 648, 685 (1935).

During a period of the most intensified production of war materials, the individual petitioners' efforts would be diverted by the complexities of a litigation involving many phases of their organization and functions, all of which may be wholly unnecessary and useless if they are ultimately sustained on the issue presented. This consequence may not be restricted, however, to this one segment of industry. In reliance upon the decision below, it is not unreasonable to assume that similar proceedings may be instituted with respect to other fields of industry and production, with resulting cumulative effects. The public interest in the avoidance of every unnecessary dissipation of productive effort at this critical period points to the need of a determination by this Court that will obviate such a risk.

Nor are the consequences of delay confined solely to present public needs. The purposes of the Webb-Pomerene Act, namely to foster and encourage the development of foreign trade, are of particular significance with reference to the post-war period. The generally anticipated expansion of foreign trade upon the termination of the war is a matter of national interest and of preparation and planning on a national and international basis. Pertinent policies and plans cannot be developed overnight. If export trade associations are to fulfill the purposes for which Congress authorized their creation, the public interest will be promoted by the elimination of legal uncertainties, the existence of which may not only require a diversion of effort of those so engaged, but also retard and mitigate against the successful inception of programs of international commerce and trade.

2. This Case Presents an Important Question of Federal Law That Has Not Been, But Should Be, Determined by This Court.

Section 2 of the Webb-Pomerene Act contains a general exemption from the provisions of the Sherman Act, subject

to the four exceptions that are set forth in its two provisos. Section 5 of the Act sets forth the procedural provisions for its enforcement and policing. After requiring the filing of specified data with the Federal Trade Commission, together with such other information as the Commission may require, the second paragraph of Section 5 directs the Commission to conduct an investigation into alleged violations of the law whenever it shall have reason to believe that such a violation shall have occurred. The acts and circumstances constituting violations are set forth in the paragraph, in terms identical with the exceptions contained in the provisos of Section 2.

The jurisdiction of the Commission does not end with the investigation. If it concludes that the law has been violated, it may make to the association recommendations for the readjustment of its business to the end that the association may thereafter maintain its organization and management and conduct its business in accordance with law. The final sentence of the paragraph sets the limits of the Commission's jurisdiction and prescribes the time at which the duties of the Attorney General and the jurisdiction of the courts commence:

> "If such association fails to comply with the recommendations of the Federal Trade Commission, said Commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

The statutory direction seems clear that only upon noncompliance with the Commission's recommendation does its jurisdiction cease, and only then does the procedure elsewhere prescribed for enforcement of the Sherman Act come into play.

The court below held that the powers so conferred on the Commission by this Section 5 are merely auxiliary and

do not prevent the maintenance of an action by the Attorney General prior to final action by the Commission pursuant to the powers granted it. This presents an important question of federal law that has not been, but because of its grave consequences should be, determined by this Court.

Decisions Under Other Statutes

The District Court concluded that the decision of this Court in *United States* v. *Borden Co.*,[5] which construed the Agricultural Marketing Agreement Act[6] and the Capper-Volstead Act,[7] is controlling. It is submitted that that decision is not determinative of the issue here presented, because of the vital distinctions between the statutes involved.

As to the portion of the decision in the *Borden* case dealing with the Agricultural Marketing Agreement Act, upon which the District Court below did not purport to rely, the decision of this Court plainly rested upon the ground that there had not been a compliance with the statutory condition that the Secretary of Agriculture approve or enter into the agreement or make an order or award with respect thereto.[8]

As to the portion of the opinion dealing with the Capper-Volstead Act, the following distinctions are significant:

(i) This Court pointed out that the Capper-Volstead Act provided only a "limited procedure" that did not cover the entire field of the Sherman Act.[9] The Webb-Pomerene Act, however, empowers the Commission to act, as to a foreign trade association, with respect to all matters that

[5] 308 U. S. 188 (1939).

[6] Act of June 3, 1937, ch. 296, 50 Stat. 246, 7 U. S. C. A. § 608 b *et seq.*

[7] Act of February 18, 1922, ch. 57, 42 Stat. 388, 7 U. S. C. A. §§ 291, 292.

[8] 308 U. S. 188 at 199-201.

[9] 308 U. S. 188 at 206.

are embraced by the Sherman Act, by reason of the all-inclusive matters specified in the second paragraph of Section 5.

(ii) The Capper-Volstead Act made no provision for enforcement by the Attorney General of the provisions of the Sherman Act in the event of non-compliance with the orders of the Secretary of Agriculture, but only for the enforcement of the Secretary's orders, leaving, as this Court observed, only a civil proceeding available. On the other hand, the Webb-Pomerene Act specifically provides a procedure for the enforcement of the Sherman Act and the application of its sanctions upon non-compliance with the Commission's recommendation.

(iii) The Capper-Volstead Act, as construed by the District Court in the *Borden* case, provided in substance a *substitute* remedy that was not as complete as that afforded by the Sherman Act, whereas the Webb-Pomerene Act contemplates not a substitute remedy but merely an initial procedure that gives the Commission primary jurisdiction until such time as its powers prove ineffective. Thereafter, but not prior to that time, the procedure generally applicable under the Sherman Act becomes available.

(iv) Under the Capper-Volstead Act the Secretary of Agriculture was concerned only with the activities of the association as such, while under the Webb-Pomerene Act the Commission is concerned with the whole effect upon interstate and foreign commerce not only of the association itself and its acts, but also of its agreements with others and acts pursuant thereto.

Viewed in the light of the relatively restricted character of the subject matter entrusted to the Secretary of Agriculture under the Capper-Volstead Act, as contrasted with the broad scope of power granted the Federal Trade Com-

mission under the Webb-Pomerene Act, we believe that these distinctions support the conclusion that the *Borden* case is not controlling of the issue here presented.

No other decision of this Court is referred to by the District Court as supporting its conclusion and only one other was referred to by the Government in its memorandum in opposition to the motion below, *United States* v. *Pacific & Arctic R. & N. Co.*[10] The decision in that case involved two distinct questions. As to the counts of the indictment charging a violation of the anti-trust laws, it was held that the District Court improperly sustained demurrers, inasmuch as infringement of the anti-trust law was charged. The opinion states that it was unimportant to consider the power of the Interstate Commerce Commission, which is a natural conclusion in view of the absence of jurisdiction in the Interstate Commerce Commission over anti-trust questions.

With respect to the charges of discrimination, however, this Court held that different principles were determinative and that the demurrers to those charges were properly sustained on the ground that the District Court was without jurisdiction until the questions involved had been passed upon by the Interstate Commerce Commission. Contentions of the Government to the effect that such a result would impede the prosecution of offenses and that the Interstate Commerce Commission would become "practically the court of final criminal resort" were dismissed on the ground that the Interstate Commerce Act had civil and administrative phases, as well as criminal, and that the procedure adopted would permit the exercise of civil and criminal remedies, each in its proper circumstances. The Court stated that it would be an erroneous view that the great problems which the Interstate Commerce Act was intended to solve

[10] 228 U. S. 87 (1913).

should be considered of less consequence than the facility to be given a particular remedy.

The reasoning followed by this Court in the *Pacific & Arctic* case, as applied to matters within the jurisdiction of the Interstate Commerce Commission over interstate commerce, is equally applicable to the Federal Trade Commission in its jurisdiction over foreign trade.

From the foregoing, it is submitted that the decision in the *Pacific & Arctic* case, rather than supporting the Government, in fact supports the position of these petitioners.

If any conclusion with respect to statutes other than those there involved can be drawn from the *Borden* and the *Pacific & Arctic* cases, it is that the determination of the extent to which primary jurisdiction may be exclusively exercised by a commission must be made with respect to each statute in the light of its particular provisions and the purposes sought to be attained thereby. Until this determination with respect to the Webb-Pomerene Act is made by this Court, existing uncertainty will continue.

The Legislative History of the Act

The record of the Congressional proceedings upon the adoption of the Webb-Pomerene Act is indicative of "the environment at the time of the enactment"[10a] as bearing upon the Congressional intent that the initial determination of whether there has been a departure from the permissible limits of the Act and a resulting violation of the Sherman Act is entrusted to the Federal Trade Commission rather than the courts.

[10a] *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 50 (1910).

The Congressional debates also indicate an intent that, as to trade within the nation, the Sherman Act was not to be considered repealed, or its effectiveness diminished, by enactment of the Webb-Pomerene Act. This is wholly consistent with the construction stated above, namely, that the Commission has primary jurisdiction. The operation and effectiveness of the Sherman Act is not impaired thereby—there is merely an imposition of a different tribunal which makes the initial determination. After the Commission has exercised its powers and the effort has proved unsuccessful, the course of procedure under the Sherman Act becomes operative and fully effective.

The debates, read as a whole, support this interpretation. Isolated statements, bearing one way or another, when divorced from their context or from the whole general scheme, may be misleading, but some indication of the circumstances attendant upon the enactment, as relating to Congressional intent appears from the following extracts:

(a) The Senate Report:[11]

> "Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States which may result in the destroying, seriously injuring, or affecting our commerce, foreign and domestic, by means other than by unfair methods of competition. It seems advisable, therefore, to the majority of the committee that the Federal Trade Commission should be clothed with full power to investigate, so that they may determine whether and to what extent the laws have been violated."

(b) By Mr. Pomerene:[12]

> "Our thought was that, if we could frame this bill in such a way as to show the real purpose, the general

[11] No. 1056, 64 Cong. 2nd Sess. at pp. 3-4 (on H. R. 17350).
[12] Cong. Rec. Vol. 55, Part 3, p. 2788.

purpose, with respect to foreign trade, the Federal Trade Commission could be trusted to apply it to cases arising in practice.

"Mr. Weeks. Mr. President, assuming that we are willing to do that and that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?

"Mr. Pomerene. It might do that.

"Mr. Kellogg. Mr. President—

"Mr. Pomerene. But, if the Senator from Minnesota will permit me, if it related to the foreign trade—and that is the purpose of this bill—I think it is pretty clear, at least it is clear to my own mind, that the criminal penalties under the Sherman anti trust law would not apply to these foreign contracts or associations."

(c) Mr. Pomerene:[13]

"* * * we have provided particularly that all the operations of these associations shall be subject to the jurisdiction and control of the Federal Trade Commission; and if in anywise they may be interfering with what may be regarded as fair competition, or if they may be violating the laws of the land—trust laws or others—then the Federal Trade Commission can investigate and make orders respecting the conduct of their business; and if they fail to comply with these orders, then these matters may be certified over to the Department of Justice for such action as they may think proper."

(d) Mr. Kellogg:[14]

"So the bill not only protects the competitor in the export trade, but it gives the Federal Trade Commission jurisdiction over the entire subject."

[13] Cong. Rec. Vol. 55, Part 7, p. 7326.
[14] Cong. Rec. Vol. 56, Part 1, p. 111.

(e) By Mr. Pomerene:[15]

"Mr. Pomerene. Mr. President, the Senator from Iowa has several times made the statement that it was the intention of this bill to repeal the Sherman anti trust law in so far as it applies to our foreign trade. I submit to the Senator that that overstates the purpose of the bill. We are very careful in this bill to provide that where restraint is due to unfair methods of competition they will be subject to control by the Federal Trade Commission, and also they have the power after investigation to refer these matters to the Department of Justice for such action as that department may deem proper. It is true it authorizes combination and associations, and to that extent it does repeal the act, but it does not permit the use of any unfair method of competition in the way of interfering with the foreign trade."

The construction of the Act that petitioners urge is not a novel one. A pamphlet entitled "The Export Trade Act", issued in November 1935 by the Bureau of Foreign and Domestic Commerce of the Department of Commerce, contains the following at page 1:

"Although there are restrictions in the Act which may seem burdensome, these were placed there to safeguard our traditional policy of open competition in industry.

"If upon investigation by the Federal Trade Commission of an act of an export association it is deemed to be a violation of the law, the offender is not penalized but reminded of the fact and directed to amend its ways. Only upon failure to comply with the recommendations of the Commission will the matter be brought to the attention of and for action by the Attorney General."

[15] Cong. Rec. Vol. 56, Part 1, p. 119.

3. This Case Presents a Question of General Public Importance Concerning the Respective Jurisdictions of Commission and Court.

This Court has consistently upheld Congressional purposes to utilize, in the administration and enforcement of complex regulatory statutes, the "expert, informed judgment"[16] and "experience and discretion"[17] of administrative commissions and has sought to give effect to Congressional intent to delegate functions "to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests".[18]

The growing complexities and interrelations of economic and social problems have been recognized by this Court as creating a need for an administrative process that can deal expertly, at least in the first instance, with particular problems that require a background of factual knowledge and experience.

The field of economy dealt with by the Webb-Pomerene Act presents just such a situation. While the President and Congress sought to stimulate the development of foreign trade,[18a] it was recognized that, because of its close interrelation with domestic trade, measures of regulation and supervision were required. The ramifications and technical aspects of foreign trade, its many effects upon domestic commerce and its bearing upon the economic conditions of the nation are matters which are peculiarly susceptible to administration by an "experienced" body having "expert, informed judgment".

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[16] *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 539, 568 (1943).

[17] *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509 (1943).

[18] *Gray* v. *Powell*, 314 U. S. 402, 412 (1941); see also *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485 (1931).

[18a] Cong. Rec. Vol. 55, Part 1, pp. 31, 32; Cong. Rec. Vol. 56, p. 181.

To accomplish its purposes, Congress entrusted primary jurisdiction over enforcement of its policies to such a body, the Federal Trade Commission. Its organization and experience well fitted it for the function, and it is a matter of common knowledge that proceedings under the Act have been and are being taken by the Commission. If, however, as concluded by the District Court, the courts may act in the same sphere, without awaiting initial action by the Commission, the purposes and intent of Congress are to that extent nullified and the administrative process deprived of its value.

As this Court has said:[19]

> "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

The application of this view is reflected in the doctrines of "primary jurisdiction" and "exhaustion of administrative remedies", both of which this Court has been careful to maintain in order to give effect to Congressional purposes.[20] The former has particular pertinence here.

By the provisions of Section 5 of the Webb-Pomerene Act, a specific procedure for enforcement of the Act is pro-

[19] *United States* v. *Morgan*, 307 U. S. 183, 191 (1938).

[20] *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139 (1939); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51 (1938); *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); *Gray* v. *Powell*,

(Footnote continued on page 18)

vided and the Congressional purpose seems apparent that the Commission is entrusted with exclusive primary jurisdiction over the subject matter of the Act, namely, foreign trade associations, their acts, agreements and acts pursuant thereto. The point at which this jurisdiction ceases and that of the court commences, upon action by the Attorney General, is clearly expressed.

The District Court concluded that in determining the line of demarcation between the functions of court and commission it was bound by the decision of this Court, under another statute, in *United States* v. *Borden*,[21] which as we have heretofore shown is not controlling. In so doing it interpreted the Webb-Pomerene Act as to deprive the Commission of its initial jurisdiction.

This important question of the respective functions and jurisdictions of court and commission requires a final determination by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States District Court for the Southern District of New York, commanding that court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket "No. Civ. 24-464, *United States of America* v. *United States Alkali Export Association, Inc., et als.*", to the end that said cause may be reviewed and determined by

(footnote continued from page 17)

314 U. S. 402 (1941). In the latter case, this Court said (at p. 412): "Where as here a determination has been left to an administrative body, this delegation will be respected and the administration conclusions left untouched. * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."

[21] 308 U. S. 188 (1939).

this Court; that the order of said District Court entered January 12, 1945 be reversed; that the complaint therein be dismissed; and that your petitioners be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated January 22, 1945.

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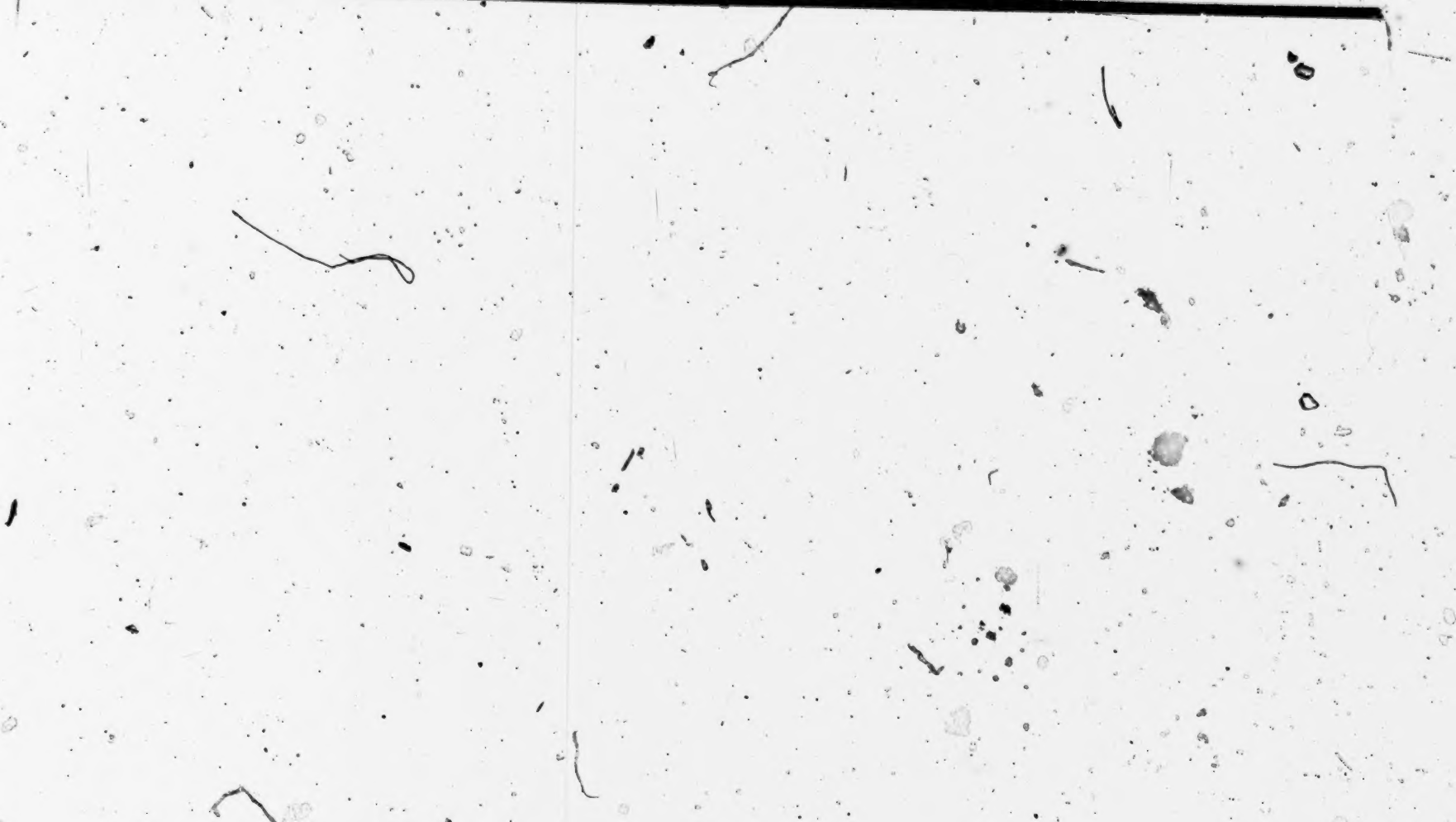
[APPENDIX FOLLOWS.]



APPENDIX.

Webb-Pomerene Export Trade Act.

Section 2 (40 Stat. 517; 15 U. S. C. A. § 62):

"That nothing contained in the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association or which substantially lessens competition within the United States or otherwise restrains trade therein."

Section 5 (40 Stat. 517; 15 U. S. C. A. § 65):

"That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by laws, and if unincorporated, a copy of its articles or contract of association, and on

the 1st day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade

therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

"For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes'."